Supreme Court, U.S.
FILED
OCT 24
CLERK

(2)

No. 96-463

In The

Supreme Court of the United States

October Term, 1996

SHERMAN SMITH AND TRACY SMITH,

Petitioners,

v.

HOUSTON OILERS, INC. d.b.a.
THE HOUSTON OILERS, FLOYD REESE
AND STEVE WATTERSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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16 pp

QUESTION PRESENTED

Under the terms of the applicable collective bargaining agreement, Sherman Smith and Tracy Smith's employment as professional football players (the "Players") with the Houston Oilers (the "Oilers") could not be terminated while they were recovering from football related injuries. The Oilers offered the Players lump sum payments in exchange for their voluntary termination of employment. The Players declined the Oilers' offers and insisted on the continued payment of their full salaries during their recuperation as required by the collective bargaining agreement. The Players contend that when they declined the Oilers' termination offers, the Oilers threatened to blacklist them with other National Football League teams. The question presented is:

Did the Players' refusal of the Oilers' termination offers and insistence upon their rights to receive their full salaries during their recuperation, as provided by the collective bargaining agreement, constitute "concerted activity" under § 7 of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, such that the Players' allegations of blacklisting are subject to preemption under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)?

DESIGNATION OF PARENT COMPANY AND NONWHOLLY OWNED SUBSIDIARIES

KSA Industries, Inc. is the parent company of Houston Oilers, Inc.

Houston Oilers, Inc. has no nonwholly owned subsidiary companies.

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STATUTORY PROVISIONS

29 U.S.C. § 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(a)(1). Unfair labor practices

(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

STATEMENT OF THE CASE

Sherman Smith and Tracy Smith (the "Players") were previously employed by the Houston Oilers (the "Oilers") as professional football players. As player/employees of the Oilers, the Players were subject to a collective bargaining agreement ("CBA") between the National Football League Management Council, the bargaining representative of the member clubs of the NFL, and the National Football League Players Association

(the "Players Union"), the bargaining representative of the employee/players in the NFL. The Players were also parties to standardized NFL Player Contracts, the form of which is attached as an appendix to the CBA.

As player/employees of the Oilers, the Players participated in the team's 1994 pre-season training camp where they were injured while practicing football. After their injuries, both Players immediately began rehabilitation and conditioning programs, but remained injured for the remainder of the pre-season training camp. At the end of training camp, the team's coaching staff determined that neither of the Players would qualify to make the team's active player roster. However, under the terms of the CBA and the NFL Player Contract, the Oilers could not terminate the Players' contracts as they were still recuperating from their injuries.[1] Therefore, Floyd Reese, the Oiler's general manager, made offers to both Players in order to terminate their employment. Both Players declined their termination offers.

The Players contend that after they declined the Oilers' termination offers and insisted on being paid their full salaries while they were recovering from their injuries, as guaranteed by the CBA and NFL Player Contract, their rehabilitation and conditioning programs became

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[1] Paragraph 12 of the NFL Player Contract provides that a player's employment may be terminated by giving written notice. However, article X, § 1 of the CBA and paragraph 9 of the NFL Player Contract provide that a player's employment may not be terminated while he is injured, if such injury occurred in the performance of work-related duties such as playing or practicing football.

more strenuous and the Oilers threatened to blacklist them with other NFL teams. The Players asserted causes of action for (i) coercion, (ii) duress, (iii) extortion, (iv) assault and battery, and (v) intentional infliction of emotional distress in Texas state court against the Oilers, Floyd Reese, and Steve Watterson, the Oilers' assistant coach in charge of strength training and rehabilitation. The Oilers, Reese and Watterson will be collectively referred to as the Oilers, unless some distinction is necessary.

The Oilers removed the case to the United States District Court for the Southern District of Texas, Houston Division, and filed a motion to dismiss pursuant to Fed. R. Civ. P. 12b(6) on the grounds that resolution of all the Players' claims were substantially dependent upon an analysis of the terms of the CBA and NFL Player Contract and therefore preempted by federal labor law under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1978) (the "LMRA"). The district court entered an order holding that all of the Players' claims regarding their rehabilitation and conditioning programs are inextricably intertwined with the CBA and therefore preempted by § 301 of the LMRA. The district court dismissed the Players' claims for (i) coercion, (ii) duress, (iii) extortion, (iv) assault and battery, and (v) intentional infliction of emotional distress based on the Players' rehabilitation programs. The district court remanded the Players' claims for intentional infliction of emotional distress based on alleged threats by the Oilers to blacklist the Players with other NFL teams.

On appeal, the Fifth Circuit affirmed the district court's dismissal of the Players' claims regarding their

rehabilitation programs. On cross-appeal by the Oilers, the Fifth Circuit vacated the district court's remand of the intentional infliction of emotional distress claim relating to the Players' allegations of blacklisting and instructed the district court to dismiss those claims as well on the grounds that such claims constitute allegations of unfair labor practices under §§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (the "NLRA") and therefore are preempted pursuant to the doctrine announced in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959).

Subsequently, the Fifth Circuit issued its mandate. On August 6, 1996, the district court entered its order dismissing the Players' claims of intentional infliction of emotional distress based on allegations of threats of blacklisting.

REASONS FOR DENYING THE WRIT

I. This Case Raises No Conflict And No Issue Of Jurisprudential Importance.

The Petitioners do not contend that this case presents a conflict with a decision of any other court of appeals. (Indeed, the Petition does not cite a decision of any other court of appeals.) Nor could the Petitioners reasonably make such a claim. No such conflict is presented here.

Nor does this case involve a conflict with applicable decisions of this Court. As the Players implicitly acknowledge in their Petition at pages 5-6, the Fifth Circuit correctly stated the principle of law from this Court's

decision in *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 840-41, 104 S.Ct. 1505, 1515-16, 79 L.Ed.2d 839 (1984), that individual invocation of collectively bargained rights is "concerted activity" under § 7 of the NLRA. The Players merely argue that the Fifth Circuit misapplied the rule of *City Disposal* as it applies to the facts of this case. Contrary to the Players' arguments, as shown in section II below, the Fifth Circuit correctly applied the rule of *City Disposal* to the facts of this case.

Nor does this case present an issue of broad public importance or a jurisprudential matter calling for the supervision of this Court. Petitioners make no such claim.

Finally, as explained in detail in section III below, the Players do not have valid claims for intentional infliction of emotional distress under Texas law. The Players' claims, even if returned to state court, will likely be dismissed on a motion for summary judgment.

In summary, nothing in this case warrants this Court's review.

II. The Fifth Circuit Correctly Held That The Players' Claims Of Blacklisting Constitute Allegations Of Unfair Labor Practices Under The NLRA And Are Preempted Pursuant To *Garmon*.

In *Garmon*, the Court established a broad preemption doctrine in order to avoid any potential conflict in the interpretation of the NLRA: "[w]hen an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. 245, 79 S.Ct. at 780.

Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a) (1973), states:

> (a) It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [§ 7 of the NLRA];

Section 7 of the NLRA, 29 U.S.C. § 157 (1973), in turn states in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Blacklisting has traditionally been recognized as an unfair labor practice and, thus, prohibited by the NLRA. *Caldwell v. American Basketball Ass'n*, 66 F.3d 523 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 2579, 135 L.Ed.2d 1094 (1996); *NLRB v. Mount Desert Island Hospital*, 695 F.2d 634 (1st Cir. 1982); *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009, 91 S.Ct. 1253, 28 L.Ed.2d 545 (1971) (concluding that the plaintiff's claim of blacklisting was within the primary jurisdiction of the NLRB pursuant to §§ 7 and 8 of the NLRA when the employee was blacklisted for strike activity); *NLRB v. Local Union 1418, General Longshore Workers*, 212 F.2d 846 (5th Cir. 1954) (Fifth Circuit affirming a determination by the NLRB that a union was guilty of an unfair labor practice in blacklisting a longshoreman); *Campbell v. McLean Trucking Co.*, 592 F. Supp. 1560 (E.D.N.Y. 1984) (finding the plaintiff's

blacklisting claim to be within the NLRB's primary jurisdiction when the employee was blacklisted for purportedly leading an unauthorized work stoppage during a dispute over a regularly scheduled coffee break). Blacklisting is the restraint or coercion of employees prohibited by § 8(a)(1) of the NLRA.

In this case, the Players contend that when they declined the Oilers' termination offers and insisted on being paid their full salaries while recovering from their football injuries as provided in the CBA, the Oilers threatened to blacklist them with other teams in the NFL and prevent them from playing professional football in the future. In essence, the Players claim that when they declined the Oilers' offers and invoked their rights under the CBA, the Oilers tried to coerce them into giving up those rights by threatening to blacklist them with other NFL teams. Relying on this Court's decision in *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 840-41, 104 S.Ct. 1505, 1515-16, 79 L.Ed.2d 839 (1984), the Fifth Circuit held that when the Players refused to accept the Oilers' termination offers and insisted on their rights to be paid their full salaries while recovering from their injuries as provided in the CBA, the Players were engaged in "concerted activity" as contemplated by § 7 of the NLRA. The Fifth Circuit further held that the Players' allegations that the Oilers threatened to blacklist them in an attempt to coerce them to give up their rights under the CBA constitute allegations of unfair labor practices, such that the Players' claims of blacklisting are preempted under *Garmon*.

The Players' legal argument rests on a narrow factual distinction: that they were threatened with blacklisting

for refusing the Oilers' buyout offers rather than for insisting upon their collectively bargained rights to be paid their full salaries while recovering from their injuries. On the basis of this illusory distinction, the Players contend that they were not engaged in "concerted activity" under § 7 of the NLRA. The Players' argument defies logic. The purpose of the Oilers' buyout offers was to pay the Players lump sum payments rather than continuing to pay them their full salaries. Without the CBA requirement that players must be paid their full salaries while recovering from injuries, no such offers would have been necessary as the NFL Player Contract provides that a player's employment may be terminated upon written notice.

The Players further argue that under *Garmon* an exception to preemption exists where the conduct is only of "peripheral concern" to the NLRA. As an initial matter, this argument was not raised before the Fifth Circuit. In any event, the Players' allegations that the Oilers threatened them with blacklisting in an attempt to coerce them to give up their rights under the CBA is directly related to the collectively bargained agreement and to the NLRA and hardly a matter of "peripheral concern."

III. The Players' Allegations That The Oilers Threatened To Blacklist Them Do Not Constitute Valid Claims For Intentional Infliction Of Emotional Distress Under Texas Law.

The Players assert claims of intentional infliction of emotional distress based on their allegations that when they refused the Oilers' termination offers and insisted on being paid their full salaries while recovering from their

football injuries, as guaranteed by the CBA, the Oilers threatened to blacklist them with other NFL teams. The Players' allegations, even if taken as true, do not rise to the level of extreme and outrageous conduct required in order to establish a cause of action for intentional infliction of emotional distress under Texas law. Accordingly, even if this Court granted the Petition and reversed the Fifth Circuit, summary judgment would follow.

The Texas Supreme Court in *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993), adopted the elements of intentional infliction of emotional distress from the Restatement (Second) of Torts § 46 (1965), requiring that in order to establish such a cause of action the plaintiff must prove that: (1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the action of the defendant caused the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe. Restatement (Second) of Torts § 46, comment d, also adopted by the Texas Supreme Court, further provides that liability for intentional infliction of emotional distress should be found "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Twyman*, 855 S.W.2d at 621-22.

In *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), a case involving claims of intentional infliction of emotional distress, the Court held that federal labor law preemption does not apply when the conduct alleged is "so outrageous that no reasonable man in a civilized

society should be expected to endure it." 430 U.S. at 303, 97 S.Ct. at 1064. As is apparent from the language used by the Court, the same standard of extreme and outrageous conduct that is required to establish an exemption to federal labor law preemption is required to establish the tort of intentional infliction of emotional distress. Both the district court and the Fifth Circuit have refused to apply the *Farmer* exception to federal labor law preemption in this case despite the Players' specific requests to do so.

By refusing to apply the *Farmer* exception to federal labor law preemption in this case, both the district court and the Fifth Circuit have in effect determined that the Players' allegations do not meet the standard of extreme and outrageous conduct required in order to establish a claim for intentional infliction of emotional distress. The Texas Supreme Court in *Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (1993), stated, "it is for the court to determine, in the first instance, whether defendant's conduct may be reasonably regarded as so extreme and outrageous as to permit a recovery. . . . " (quoting the Restatement of Torts (Second) § 46, cmt. h). If the Players' allegations of intentional infliction of emotional distress are remanded to Texas state court, such claims will almost certainly be dismissed on a motion for summary judgment.

CONCLUSION

For these reasons, the Petition for A Writ of Certiorari should be denied.

Respectfully submitted,

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